

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 08-40
VICTOR DWIRE)	

MEMORANDUM AND ORDER

Statement of Case

At issue is a dispute over back pay and benefits due Victor Dwire (“Grievant”) as a result of his improper dismissal by the State of Vermont Agency of Transportation (“Employer”). On September 16, 2009, the Labor Relations Board issued Findings of Fact, Opinion and Order, concluding that Grievant was dismissed on August 4, 2008 without just cause. 30 VLRB 240. The Board reduced the dismissal to a 30 day suspension and ordered that Grievant be reinstated with back pay and benefits. 30 VLRB at 276-77. The Board left the case open for the purpose of determining the specific back and other benefits due Grievant from the date commencing 30 working days from the date of his discharge to the date of his reinstatement. Id.

The parties have entered into a partial stipulation concerning back pay and benefits due Grievant, but have not reached agreement on certain issues. The unresolved contested issues are as follows: a) whether the award of overtime to Grievant should include the period he was on temporary relief from duty with pay; b) whether the overtime due Grievant should be calculated based on his working federally-funded projects; and c) whether the Employer is entitled to a credit for the gross amount, or the net amount, it paid Grievant for his accrued annual leave upon his dismissal.

The parties stipulated to the relevant facts on these issues, and agreed that there was no need for an evidentiary hearing. Grievant and the Employer filed briefs on the disputed issues on January 11 and 13, 2010, respectively.

The parties have stipulated to the following terms and conditions of Grievant's reinstatement, the back pay and benefits due Grievant, and the relevant facts concerning the contested issues:

1. In reinstating Grievant to his position as an AOT Technician VI, the Employer will assign Grievant to the Operations Division pending a decision by the Federal Highway Administration ("FHWA") whether to lift its suspension of Grievant. Should the FHWA decide to lift its suspension of Grievant, thus permitting him to work on federal-aid highway projects, the Employer will reassign Grievant to the Construction Section as a Resident Engineer.

2. The amount of back pay for regular wages due Grievant from the date commencing 30 working days from the effective date of his dismissal to his reinstatement is \$42,328.85.¹ This amount includes the 12 percent annual interest computed on gross pay running from the date of each paycheck, minus income from annual leave payments, retirement benefits and unemployment compensation received by Grievant during the period commencing 30 working days from the effective date of his dismissal to his reinstatement.

3. On reinstatement, Grievant will be credited with the maximum number of hours of accrued annual leave – 360 hours – as well as 2,333 hours of sick leave.

¹ This amount assumes the reinstatement of Grievant on November 30, 2009. This amount would need to be recalculated if Grievant is reinstated on a date other than November 30, 2009.

4. The Employer will remove all references to Grievant's dismissal from his official personnel file and replace it with a reference to a 30 day suspension consistent with the Board's decision.

5. If Grievant is awarded his regular wages and average overtime for the period September 14, 2008, to November 21, 2009, the net amount owed him is \$57,556.

6. If Grievant is awarded his regular wages for the period September 14, 2008, to November 21, 2009; and average overtime for the period January 2007 to November 2009; the net amount owed him is \$86,339.

Discussion

Preliminarily, there are two matters addressed in the Employer's brief that need to be discussed. The Employer requests the opportunity to present a reply brief to Grievant's brief. We deny this request. The Board as a matter of practice for more than 20 years has not allowed parties to file reply briefs, including cases where back pay is in dispute. We will continue to adhere to this practice.

The Employer also requests that it be allowed the opportunity to present evidence as necessary on the remaining issues before the Board. The parties to this case specifically agreed that there were no factual matters in dispute and that no evidentiary hearing was necessary on the disputed back pay issues. Thus, we deny the Employer's request.

We now turn to discussing the three disputed issues concerning the back pay due Grievant. The parties disagree on the relevant time period covered by an award of overtime to Grievant. The September 16, 2009, Order of the Board provided: "Grievant shall be awarded back pay and benefits from the date commencing 30 working days from

the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim.”

Grievant contends that, contrary to the Board Order, he should recover overtime for the lengthy period (approximately 18 months) that he was on temporary relief from duty with pay. The State contends that the overtime award should be limited to the period ordered by the Board, the period commencing 30 working days from his dismissal.

The Board has not issued an order in the past directing overtime compensation to be paid during a period an employee was on temporary relief from duty with pay, and standards established by the Vermont Supreme Court do not favor such a result. The Supreme Court has held that if the Board finds lack of just cause for dismissal, its authority is limited to remedying the improper dismissal; with the proper remedy generally being “reinstatement with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned from that date”. Grievance of Brooks, 135 Vt. 563, 570 (1977). This has been a general standard long guiding the Board in calculating back pay orders.

Since our remedial power begins at the time of the improper dismissal, we lack the authority to award overtime pay to Grievant predating his dismissal. We recognize that Grievant was on a temporary relief from duty with pay status for an inordinately long time. Article 14, Section 9, of the Contract provides that “(a)n appointing authority may relieve employees from duty temporarily with pay for a period of up to thirty workdays”, which period “may be extended by the appointing authority with the concurrence of the

Commissioner of Human Resources.” Grievant was on temporary relief from duty with pay for approximately 18 months, well beyond the regular 30 day period established by the Contract and much longer than any case that has previously come before the Board. Nonetheless, based on Supreme Court precedent and absent any specific provision in the Contract providing for overtime pay being awarded to employees in temporary relief status, Grievant is without recourse to recover overtime for this period.

The second issue in dispute between the parties is whether the overtime due Grievant should be calculated based on him working federally-funded projects. The State contends that overtime calculations should not consider him working on these projects because the federal government had suspended him from such projects during the period of his dismissal. Grievant contends that overtime calculations should be based on the average number of overtime hours he worked from 2004 through 2006 prior to the federal suspension.

The Board has never addressed the specific issue of whether the overtime due a dismissed employee should be calculated based on working federally-funded projects when the employee had been suspended by the federal government from working on such projects. We look to the general standards in back pay cases and the specific precedents on overtime compensation due an improperly dismissed employee for guidance in addressing this novel issue.

In calculating a back pay award, the monetary compensation awarded shall correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee "whole". Grievance of Goddard, 4 VLRB 189, at 190-191 (1981). c.f., Kelley v. Day Care Center, Inc., 141 Vt. 608, at 615-616 (1982).

To make employees whole is to place them in the position they would have been in had they not been improperly dismissed. Grievance of Lilly, 23 VLRB 129, 137 (2000); *Affirmed*, 173 Vt. 591, 593 (2002). Grievance of Benoir, 8 VLRB 165, 168 (1985).

The Vermont Supreme Court has held that, where an employee proves that he or she would have earned overtime compensation but for an unjust dismissal, a back pay award must ordinarily include lost overtime compensation. In re Grievance of Brown, 177 Vt. 365 (2004). It is the Board's task to estimate the amount of overtime that the employee would have worked within reasonable limits to determine a fair amount. Id. at 378. The Court left it to the Board's discretion to calculate overtime either based on the average of the employee's previously-worked overtime or on the overtime of a similarly-situated employee. Id.

These standards and precedents are of some assistance in deciding the specific issue of whether the overtime due Grievant should be calculated based on working federally-funded projects when he had been suspended from working on such projects, but they do not dictate a particular result. This is a difficult issue with no clear path laid out for a decision. The Supreme Court has commented as follows on the difficulties the Board may encounter in remedying improper dismissals:

In formulating remedial orders, the Board has wide discretion as to the method of back pay calculation, and reversal is only warranted if "the method chosen was so irrational as to amount to an abuse of discretion." *Bagel Bakers Council v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977)) (per curiam); see *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963) (Board's method of back pay calculation will be upheld unless it is arbitrary or unreasonable). As the court said in *Bagel Bakers Council*:

A back pay award is only an approximation, necessitated by the employer's wrongful conduct. In any case, there may be several equally valid methods of computation, each yielding a somewhat different result . . . The fact that the Board necessarily chose to proceed by one method

rather than another hardly makes out a case of abuse of discretion. 555 F.2d at 305.

The Board is not compelled to consider adjustments which themselves are clouded by uncertainty and which need not be considered to yield a result that is fair and equitable under all the circumstances of the case. Grievance of Merrill, 157 Vt. 150, 154-55 (1991).

In examining all the circumstances of this case, we conclude that the fair and equitable result in determining Grievant's back pay award is that overtime calculations should be based on Grievant working on federally-funded projects. The FHWA suspended Grievant from working on projects that received federal funds based on a criminal charge filed against Grievant by the Vermont Attorney General. 30 VLRB at 254, Finding of Fact No. 34. The criminal charge stemmed from an investigation of the Criminal Division of the Attorney General's Office which resulted because the Employer referred the matter involving alleged misconduct by Grievant to the Criminal Division. 30 VLRB at 250, Finding of Fact No. 250. Vermont District Court Judge Patricia Zimmerman ultimately dismissed the criminal charge against Grievant. 30 VLRB at 265, Finding of Fact No. 40.

The Employer thus set into motion the series of events which ultimately led to the suspension of Grievant from working on federally-funded projects. It is appropriate that the Employer bear the consequences of the events which it set into motion. If the suspension which a judge ultimately determined was based on an unproven criminal charge had not occurred, Grievant would have been eligible to work overtime on federally-funded projects as he had in the past. Under the circumstances, overtime calculations in determining Grievant's back-pay award should be based on the average number of overtime hours he worked from 2004 through 2006 prior to the federal suspension.

The third disputed issue between the parties is whether the Employer is entitled to a credit for the gross amount it paid Grievant for his accrued annual leave upon his dismissal. The Employer contends it is entitled to such a credit, while Grievant asserts that the State is only entitled to a credit for the net amount of this figure, adjusted for the income taxes of approximately 30 percent which he paid.

In past cases, we have ordered that the back pay due an improperly dismissed employee be offset by a credit to the employer for the gross amount of an accrued annual leave payment to an employee. Grievance of Benoir, 8 VLRB 165 (1985). Grievance of Carosella, 8 VLRB 178 (1985). Grievance of Merrill, 8 VLRB 383, 386-387 (1985). Grievance of Rosenberger, 29 VLRB 194 (2007) Appeal of Davidson, 30 VLRB 363 (2009). The difficulty of calculating back pay awards based on net amounts, adjusted for payment of income taxes, was pointed out by the Supreme Court in Grievance of Merrill, 157 Vt. 150 (1991). There, the employer requested that the interest calculations be based on the net amount of wages, rather than gross wages. In denying that request, the Supreme Court cited with approval the National Labor Relations Board practice of awarding interest on gross back pay “in light of the uncertainty of the taxation of a large sum award” to employees.

The uncertain tax implications of back pay awards has been a significant factor in the Board calculating back pay awards based on gross pay, and we do not believe it wise to deviate from this long-standing practice. Also, since back pay awards are calculated based on gross pay, it would be inconsistent if any payments made to an employee to offset such an award were based other than on gross payments made to employees. Thus,

we conclude that the Employer is entitled to a credit for the gross amount it paid to Grievant for his accrued annual leave upon his dismissal.

Based on the foregoing reasons, it is ordered:

1. The terms and conditions of paragraphs 1 – 6 of the previous order of the Labor Relations Board in this matter dated September 16, 2009, are incorporated herein by reference;
2. The Employer shall forthwith pay to Grievant an amount representing back pay, said sum being calculated in accordance with the terms of the stipulation entered into by the parties (the terms of which are incorporated herein by reference) and the provisions of this order;
3. The back pay due Grievant shall be offset by the gross amount of the accrued annual leave payment received by Grievant at the time of his dismissal;
4. Grievant shall be awarded back pay for the amount of overtime he would have worked from the date commencing 30 working days from the effective date of his dismissal until his reinstatement. The overtime award shall be calculated based on the average number of overtime hours Grievant worked from 2004 through 2006; and
5. The parties shall file with the Labor Relations Board by March 26, 2010, a proposed order indicating the specific amount of back pay and benefits due Grievant based on this order. The parties shall be prepared to meet with the Labor Relations Board Executive Director on March 31, at 9 a.m., in the Labor Relations Board hearing room to address any unresolved components of the proposed order.

Dated this 4th day of March, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

Edward R. Zuccaro, Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle